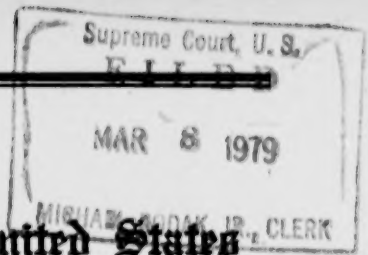


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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1978



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**No. 78-880**

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LOCAL UNION NO. 373, *et al.*,  
*Petitioners,*  
*vs.*

PHILIP MUNDY, *et al.*,  
*Respondents.*

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**On Petition for a Writ of Certiorari to the Superior Court  
of New Jersey, Appellate Division**

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**BRIEF IN OPPOSITION**

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CRANER & NELSON, P.A.  
*Attorneys for Respondents,*  
The Bank Building,  
213 Summit Road,  
Mountainside, New Jersey 07092.  
(201) 233-7005

JOHN A. CRANER,  
*Of Counsel.*

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### BRIEF IN OPPOSITION

#### Counter-Statement of Jurisdiction

Respondents contend that no federal jurisdiction is properly invoked. Respondents, plaintiffs below, did not base their cause of action on any right claimed under the United States Constitution or any federal statute or federal court

order. This case involves property rights claimed under state law.<sup>1</sup> No court below declared invalid or interfered with in any way any statute or order of a federal court. Accordingly, there is no jurisdiction under 28 U.S.C. § 1257 or any other federal statute.

### Questions Presented

1. Whether any federal question is raised by a state court's consideration of a federal Consent Decree entered into by Petitioner and dismissed of same as a defense to Respondent's cause of action based entirely on state law.

2. Whether the state court's finding that state law and a Federal Consent Decree are harmonious and consistent constitutes an "attack", direct or collateral, on the Decree, or prevents Petitioners from carrying out their obligations under the Decree.

### Federal Statute Involved

Respondents contend that no federal statute is involved, since Respondent's cause of action below and the state court's resolution of same were based entirely on state law.

<sup>1</sup> The Court is respectfully referred to *Philipchuck v. Ironworkers Local 483*, an unreported opinion of the Court of Appeals, for the Third Circuit, No. 72-1344 dated March 2, 1973, affirming the District Court of New Jersey (87LRRM3169), wherein the Court of Appeals "carved out" an area of state jurisdiction in holding no federal jurisdiction. In the original case of *Moore v. Local 483*, 66 N.J. 527 (1975), the District Court remanded the case back to the state court because there was no federal jurisdiction. *Moore* was, therefore, an action commenced under this state court "carved out." The instant cases are the Follow-up to *Moore*.

### Counter-Statement of the Case

Respondents, members of various local unions of the International association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO (hereinafter referred to as the "International") brought suit in the state courts of New Jersey in 1972 seeking to compel Petitioners to effect their transfers between local districts in accordance with the International Constitution. The trial court denied relief. On appeal, the New Jersey Supreme Court in *Moore v. Local 483*, 66 N.J. 527 (1975) reversed and remanded, holding that concepts of due process applied and that pursuant to the State law doctrine of economic necessity (see, *Falcone v. Middlesex Co. Med. Soc.*, 34 N.J. 582 (1960)) Petitioners could not, under their own constitution, reject a transfer applicant without good cause and because he had not undergone an apprenticeship. The Court directed Petitioners to review each application and, if rejected, to set forth the reasons therefor.

On remand, and for the first time, Petitioners raised as a defense the contention that they could not accept any transfers because they were under an Order entered in *United States v. Plumbers Local 24 (Ironworkers Cluster)*, U.S.D.C.N.J. Docket No. 444-71 (hereinafter referred to as the Consent Decree) not to accept any transfers unless and until 20 per cent of each Petitioner Local was composed of minority members garnered through its apprentice and trainee programs, which were established pursuant to the Consent Decree.

Because Petitioner introduced the Decree into the case as a defense to Respondent's actions, it is important to review the events leading up to the Decree.

The background of this litigation was carefully reviewed by Judge Garth in his Opinion and Order in *United States*

v. *Plumbers Local 24 (Ironworkers Cluster)*, *supra*, and in the various cases referred to in *Mocre*, *supra*.

Petitioners have, for many years, engaged in highly discriminatory practices whereby admission to the locals was restricted to blood and family relations. This extremely exclusionary policy came about because of limited job opportunities for Union Ironworkers, Local members and relatives of the officials all received preferential treatment.<sup>2</sup>

When would-be transferees, already members of the International, attempted to transfer into these locals, Petitioners resisted vigorously even though the International Constitution made the processing of such transfers mandatory, and it was necessary for the transferees to obtain court orders directing their transfers. When, in *Moore*, Respondents sought to transfer, Petitioners took the position that they could exclude transferees without giving any reason. Thus, the Court held that Petitioners could not refuse to accept a transferee unless such refusal was based on rational grounds. Petitioners did not raise the Consent Decree as a defense until *after* the *Moore* opinion.

This Decree, printed in pertinent part at page 138a of the Petition, provides that Petitioners shall admit 75 minority applicants through its apprentice and training programs per year for five years, or a total of 375 minority apprentices. No mention is made of any ration, percentage or balance of white to minority members.

Nonetheless, at each of the trials (six separate lawsuits were filed, of which only two were consolidated) Peti-

<sup>2</sup> See, for example, *N.L.R.B. v. Ironworkers, Local 373 and 45*, Nos. 78-1085, and 78-1086 (C.A. 3, 1978), enforcing decisions of the Board holding that these locals discriminated against plaintiffs in the state court action who were then not local members with respect to employment opportunities.

tioners introduced parol evidence in a desperate attempt to show that they had verbally assumed the United States that they would exclude all white transferees (but not white apprentices, with respect to whom Petitioners claimed no limitation as to numbers) until 20% minority membership was achieved and that although the Consent Decree spoke not in terms of percentage, but only in terms of absolute numbers (that is, 75 minority apprentice applicants should be admitted per year for five years) the "real" goal was not 375 minority apprentice members, but a 20% minority membership.

Contrary to Petitioner's assertion (Petition at 6) that "virtually all proofs" dealt with the Consent Decree, only their defense was addressed to this issue. Plaintiff's proofs went to the state law issue, as framed by *Moore*.

Each of the trial courts, the Appellate Division, and the New Jersey Supreme Court rejected this contention, and held, consistent with *Moore*, that the Petitioner had acted arbitrarily in refusing to process the transfers, and that the Consent Decree did not bar such transfers. These courts simply found, in rejecting Petitioners' defense, that the Decree meant what it said, and the admission of Respondents would not, in any way, interfere with or disturb the obligations of Petitioners under the Decree. No court in any way "commented" upon the federal court proceedings as a form of reverse discrimination. Thus, in dismissing Respondent's petition to the United States District Court, Judge Meanor said:

"... I cannot see where the event of adding transferees will in any way impair or affect or frustrate the Federal Court order ... [I]t is clear that the apprenticeship program under the consent decree as amended will go forth and will take in a certain number of minorities each year until the number of

375 have been admitted. And the entry of the transferees will in no way, in my judgment, frustrate or affect that program." Petition at 163a.<sup>3</sup>

Rather, each of the courts found that Petitioners brought the Consent Decree into the case in order to justify their continuing discrimination. *See, e.g.*, the opinion of Judge Ackerman, printed at Petition 80a.

"The consent decree, in my judgment, has provided the local union with a convenient reason to continue its policy of discrimination against non-locals by wholesale rejection of any applicant who seeks to transfer in.

In my judgment the use of the consent decree is a thin scrim to cover the union's refusal to accept transferees." *Id.* at 104a-105a.

Having lost in the state forum, Petitioners sought to relitigate these very issues in the federal courts. The District Court and the Court of Appeals for the Third Circuit both rejected this collateral attack upon the judgment of the state courts, and in particular, the argument advanced herein that the state courts were infringing upon the Consent Decree.

At no time, up to and including the present, did Petitioners seek to remove any of the cases to the Federal District Court, within the framework of the Title VII pro-

<sup>3</sup> Although they had numerous opportunities to initiate proceedings in the Title VII proceedings while the state litigation was pending, to seek clarification or other relief, Petitioners chose to wait until final state action was concluded. At this juncture, the federal courts were obligated to give full faith and credit to the state court rulings. 28 U.S.C. §1738.

ceedings (the District Court having retained jurisdiction following an entry of the Consent Decree). Petitioners never sought an Order from the District Court clarifying the Decree, nor did they ever petition the District Court to enjoin the state proceedings, on the ground of interference with a federal Decree or otherwise.

## ARGUMENT

**The state court's interpretation and rejection of the Consent Decree as a bar to Respondent's state law actions neither "attacks" the Consent Decree nor raises any federal question; therefore, the Petition for Writ of Certiorari should be denied.**

It can be seen from even a cursory reading of the trial court opinions that this litigation dealt with union members' state law rights to transfer between districts. The New Jersey Supreme Court decision which remanded these cases, *Moore v. Local 483, supra*, dealt entirely with the State law doctrine of economic necessity. That opinion contains no mention whatever of the Consent Decree, Title VII, reverse discrimination, or any other federal or civil rights matter, even though the Decree had been entered years earlier.

It was only *after* the *Moore* opinion that Petitioners brought race into the case, when they asserted that the Consent Decree was a defense to Respondents' lawsuits. Even then, however, Petitioners did not seek to remove the case to federal court, or in any other way to have the federal court intervene and defend against this so-called "attack" on the Consent Decree. Rather, they chose to litigate the issue in state courts. It was the Petitioners, nor Respondents, who injected this matter into

the case and asked the trial courts to consider it. They did, independently and unanimously finding that the Decree was no bar to the Respondents' actions. It was the Petitioners, not Respondents, who introduced parol testimony in an effort to show that the Consent Decree meant something other than what it clearly stated. To say that "the state courts took it upon themselves to unilaterally abrogate" the Decree, Petition at 15, is simply untrue. These courts neither took it upon themselves to consider the Decree, nor did they abrogate it.

Having introduced the issue into the state court, and lost, Petitioners now claim that it was error for the courts to have considered it. This argument is absurd. Under this reasoning, it would be in every litigant's interest to raise numerous foreign issues, so that if he loses, he can claim error in the court's consideration of the issues he brought into the case. The delay, trouble and expense to the courts and litigants would be tremendous.

Moreover, contrary to Petitioner's statements that the State courts have no power to interpret a federal Order, it is clear that they do. Even if the issue had not been brought into the case by Petitioners, the state courts have jurisdiction to decide federal issues. *See, e.g., Palmore v. United States*, 411 U.S. 389 (1973); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962) (holding that state courts can be an appropriate forum in which to decide federal questions). Indeed, it is beyond cavil that in some matters the state and federal courts exercise concurrent jurisdiction.

Petitioners are also incorrect when they state that the trial courts decided the issue erroneously. The Consent Decree clearly and unambiguously requires only that Petitioners admit into membership 375 minority applicants over five (5) years, something they have failed to do de-

spite numerous extensions of the original time period. The Decree most certainly does not address itself either to white members or to total membership, and in fact, Petitioners continue to admit new white apprentices. Each trial court held that the document speaks for itself, and gave the document the plain meaning which is apparent on its face. Had the government intended to impose a quota, it would have said so. It was entirely proper for the courts below to hold that the express terms of this agreement controlled over the contrary meaning which Petitioners sought to impose on it. As this Court has held, "the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971).

Not only did Petitioners fail to seek the aid of the District Court to "protect" its Order, but significantly, the government never entered the case to support Petitioner's argument that the Decree mandated a ban on all white transferees, rather than simply requiring the admission of a specific number of minority apprentices and trainees. Surely they would have taken some action if they agreed with Petitioners.

Finally, a reading of the cases cited by Petitioners shows that they actually support Respondent's arguments. This case is not, as Petitioners would have this Court believe, one where Respondents attacked, in state court, the validity or effect of a federal order. Cf. *Martini v. Republic Steel Corp.*, 532 F. 2d 1079 (6th Cir. 1976). The opinion of Judge Ackerman makes clear that the Decree entered the case only as a defense to state law claims:

"It should be noted, however, that in the instant case the plaintiffs seek to be transferred not on the basis of discrimination in employment—although, as

I have noted, some evidence to that effect has crept into the case, but, as I pointed out, was not considered to and is not being considered in deciding this case. They seek to transfer on the basis of the intangible benefits of participating, to be derived by virtue of participating in the local union's internal affairs. It is my judgment that this is within the sphere of union activities in which the state courts have authority. It is clear to me that this Court is not thereby preempted from dealing with the issue."

Petition at 95a. Clearly, there was no state court finding that the "Title VII Consent Decree constitutes reverse discrimination." Petition at 15.

In each of the cases cited in the Petition (at 15), plaintiffs were challenging the validity of the federal order, whereas in the instant case, it was Petitioners who were frustrated by the court's finding of total compatibility. The rule of the cases cited is that the federal court is the proper forum in which to contest or clarify the meaning of a federal decree. "The proper avenue for relief if there were unanticipated problems which had developed in the carrying out of the court's order, was an application to intervene and a motion for additional relief in the principal case." *Black and White Children of the Pontiac School System v. School District of Pontiac*, 464 F. 2d 1030 (6th Cir. 1973). Surprisingly, Petitioners correctly note that "[t]his is especially true in the instant matter, where the federal court retained jurisdiction over the operation and implementation of the Consent Decree", Petition at 15, *for it applies to them*. If they thought that the state judgment violated the Consent Decree, then they should have taken appropriate (and prompt) action in the United States District Court. Having chosen to

remain in the state forum, and litigate the issue in that court, they cannot now be heard to complain that the state court lacked authority. Since this case, therefore, raises no federal question, and since the state courts in no way attached or impaired the validity of the federal Decree, there is no reason for a writ of certiorari to issue.

## CONCLUSION

**For all of the above reasons, the Petition for Writ of Certiorari should be denied.**

Respectfully submitted,

CRANER & NELSON, P.A.  
*Attorneys for Respondents,*  
By: JOHN A. CRANER.

JOHN A. CRANER,  
*Of Counsel.*

RUSSELL P. GOLDMAN,  
*Legal Intern.*